

Coming to the issue of the risk of dissipation of assets, I am far from satisfied with the explanations given by the defendant. Stripping the matter to its core, we are left with a situation where the defendant has no proven prior trading record in Malaysia nor has it shown with any degree of conviction that it has secured any future business. It owns no assets within the jurisdiction and does not even have proper business premises. Further, it has been demonstrated that the plaintiff is really the alter ego of a family business run by the Bailey family. That family is resident ordinarily in the United States. The only assets within the jurisdiction are liquid assets in their bank accounts which can readily be uplifted. The plaintiff's fear of the assets being dissipated are, in my judgment, real. The balance of convenience must be in favour of the plaintiff.

In the circumstances, and in the exercise of my discretion, I am satisfied that all the necessary criteria for the grant of the injunction *inter partes* exist. I therefore grant an order in terms of Encl. (3) until the trial of this action. Bearing in mind that such an injunction may cause some hardship to the defendant, I hereby also order an early trial of this action. As soon as Counsels have settled the directions and set this matter down for trial, they may seek an appointment with me to fix trial dates.

The costs of this application shall be paid by the defendant to the plaintiff in any event.

**SHARIFAH MASTURA BTE
TUANKU IBRAHIM**

v.

WAN AZIZ IBRAHIM

HIGH COURT, KUCHING
DATO' HJ. ABDUL KADIR BIN
SULAIMAN J.

[ORIGINATING MOTION NO. KG. 17
OF 1992]
26 JULY 1993

LAND LAW: Caveat - Definition of "caveatable interest" - Sarawak Land Code (Cap. 81) s. 173(a) - National Land Code, 1965 s. 323 - Land caveated by registered proprietor - Whether registered proprietor had locus standi - Whether proprietary right per se gave rise to caveatable interest in land.

d The applicant in this case had caveated her own land in a purported attempt to protect her proprietary interest therein after the said land had been caveated upon by the respondent. The respondent had caveated the land on the strength of two deeds allegedly executed by the applicant in his favour, namely a Power of Attorney to deal with the land and a Trust Deed. The respondent subsequently applied to the Registrar of Land and Survey Department, Kuching, for the registration of a Memorandum of Transfer to transfer the said land to his name and in consequence of that application, a notice under section 178, Sarawak Land Code (cap. 81) to remove the applicant's caveat was served on the applicant by the Assistant Registrar.

e The applicant applied for an order that her caveat against the land in dispute should not lapse and should remain in force until further order of the Court. The question before the Court was whether a registered proprietor in the capacity of the applicant could make use of the provisions in s. 173 of the Sarawak Land Code to lodge a private caveat over her properties.

g **Held:**
h [1] A registered proprietor of land is not entitled to enter a private caveat in respect of his own land unless he can show some circumstances which affirmatively give rise to a distinct interest in the land other than the fact that he is the registered proprietor of the property.

i [2] In the instant case the applicant has not established any circumstance over and above

her status as registered proprietor which affirmatively gives rise to a distinct interest in the land and she cannot therefore be considered as having any caveatable interest over the said land.

[Application dismissed].

Cases referred to:

Eu Finance Bhd. v. Siland Sdn. Bhd. (M & J Frozen Food Sdn. Bhd. Intervener) [1989] 1 MLJ 195 (refd)
Asia Commercial Finance (M) Bhd. & Anor. v. Development & Realtor Sdn. Bhd. [1992] 2 MLJ 504 (refd)
Re An Application by Haupiri Courts Ltd. (No. 2) [1969] NZLR 353 (refd)

Legislation referred to:

Sarawak Land Code (Cap. 81), ss. 173, 178
National Land Code, s. 323

For the applicant - Chan Siew Yan; M/s. Ee & Lim
For the respondent - P. Phang & Tan Cho Huat;
M/s. Reddi & Co.

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

This is an application by the applicant for an order that her caveat against a parcel of land known as Lot 678, Block 12, Muara Tebas Land District ("the said land") should not lapse and should remain until further order of this Court. As a registered proprietor and by virtue of a statutory declaration the applicant caveated various parcels of her land. One of the parcels of land in question is the said land. The caveat was registered at the Kuching Land Registry Office on 30 January 1992 as Instrument No. L. 1527/1992 ("the said caveat"). This application is made in consequence of her receipt of a notice by the Assistant Registrar, Land and Survey Department, Kuching pursuant to s. 178 of the Sarawak Land Code (Cap. 81), ("the Code") giving her the required 3 months notice wherein after the lapse of the said period, in so far as it affects the said land, the said caveat shall be deemed to have lapsed and the said caveat shall be removed.

In order to succeed in her application, the applicant must establish that she has a caveatable interest over the said land. Section 173 of the Code states as follows:

173. Any person:

- (a) claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Code by virtue of any

- a unregistered agreement or other instrument or transmission or of any trust express or implied or otherwise howsoever;
(b) who is a guardian of the property of an infant beneficially interested in any land or any estate or interest therein; or
(c) transferring any estate or interest under this Code to any person to be held in trust,
b may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

In as far as her application before this Court is concerned, subparagraphs (b) and (c) do not apply. She is to establish that she has caveatable interest pursuant to subparagraph (a) of s. 173. Under this subparagraph she must be a person claiming to be entitled to or to be beneficially interested in any land, estate or interest under the Code and that it is so claiming by virtue of any unregistered agreement or other instrument or transmission, or of any trust express or implied or otherwise howsoever.

- d At the time of the lodging of the said caveat the applicant filed with the Registrar a statutory declaration giving reasons for wanting to caveat her properties. According to the declaration, by a Power of Attorney executed on the 22 May 1986 which was registered as Instrument No. L. 9391/1986 on the 13 August 1986, she appointed the respondent to be her attorney to do execute and perform all or any acts, deeds, matters and things named therein relating to her properties (which includes the said land). Subsequently it came to her notice that her attorney, who was also given a Power of Attorney by her brother, is being sued by her brother for failing to account to him under the Power of Attorney. Her brother lodged a caveat registered as Instrument No. L. 8028/1991 on his own properties to protect his interest. On account of the lodgment of the caveat by the brother, a purported trust deed mysteriously appeared whereby her brother's attorney and his siblings are claiming ownership of the properties of the brother. Because of this incident she made a search in regard to her own properties and she discovered that her properties too have been caveated by the respondent based on a Trust Deed supposedly declared by her, which according to her was untrue. So being the registered owner of her properties, she found that it is necessary that her interests be protected in a similar way by lodging a caveat over the properties while she seek the assistance of a lawyer to make application to Court for the removal of the respondent's caveat over
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her properties and also to have Power of Attorney previously given by her to the respondent revoked so that her interest in the properties may not be jeopardised by her attorney, the respondent, by freely dealing with her properties pursuant to the aforesaid Power of Attorney. So it could be seen the purpose for her caveating her properties that the whole idea behind it is to forestall any attempted dealings by the respondent over her properties pending her action against the respondent as intended. Thus she caveated her properties wherein she is the registered proprietor, solely to prevent the properties from being taken away out of her proprietorship.

Having lodged the said caveat with the aid of the statutory declaration and the said caveat duly registered on the 30 January 1992, she was served with the s. 178 notice by the Assistant Registrar of Land and Survey Department, Kuching on the 22 August 1992 for the reason that the respondent through his Counsel has made application to the Registrar for the registration of a Memorandum of Transfer affecting the said land. Early this year, by a writ of summon dated 4 January 1993 she filed a suit against the respondent in suit No. 1 of 1993 (I) claiming for:

- (1) an account of what is due to her in respect of money received by the respondent acting as her attorney;
- (2) a full report of steps taken by the respondent as attorney to ensure that a proper and fair compensation is given by the government over any of her properties acquired or to be acquired;
- (3) a full report of all other acts, deeds, matters, things done by respondent as attorney;
- (4) an order that the power of attorney be or stand revoked and that the respondent do execute the necessary consent for revocation of the Power of Attorney;
- (5) an order for the removal of the respondent's caveat over her properties;
- (6) a declaration that the Trust Deed dated the 12 April 1991 is null and void and of no effect or alternatively, for an order that it stands revoked and of no effect;
- (7) damages to be assessed, interests and costs; and
- (8) such other order or relief as the Court deems fit.

a It is to be noted that in the suit by the applicant against the respondent there is no prayer in relation to the said caveat but instead a prayer for the removal of the respondent's caveat placed on her properties mentioned earlier. However, in the affidavit of the counsel for the applicant, Chan Siew Yan affirmed on the 4 January 1993

b the deponent deposed that the said caveat of the applicant should remain in the registrar to maintain the *status quo* since the applicant by her suit against the respondent is challenging the Trust Deed and by virtue of the fact that the applicant clearly has interests in the said

c land as legal owner and registered proprietor thereof. There is no assertion that the applicant is so claiming by virtue of any unregistered agreement or instrument or transmission or of any trust express or implied.

The issue for me to decide is whether a registered proprietor in the capacity of the applicant and in the circumstances can make use of the provisions in s. 173 of the Code to lodge a private caveat over the properties. There are decisions by Judges of High Courts in relation to proceedings under s. 323 of the National Land Code, concerning person eligible to lodge private caveats. That section is *in pari materia* with s. 173 of the Code. Two such cases cited before me are *Eu Finance Bhd. v. Siland Sdn. Bhd. (M & J Frozen Food Sdn. Bhd. Intervener)* [1989] 1 MLJ 195 and *Asia Commercial Finance (M) Bhd. & Anor. v. Development & Realtor Sdn. Bhd.* [1992] 2 MLJ 504.

f LC Vohrah J. in the former case at p. 196 has this to say:

I do not think Siland (i.e. the registered proprietor/caveator) can successfully bring itself within the first limb (i.e. s. 323(1)(a) of the National Land Code) in the light of its plain meaning because in my view a person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land not merely a person claiming title or any interest in that land and must as a matter of logic have been excluded by the language of s. 323(1). As has been very succinctly put by the learned author Judith E. Sihombing in her **National Land Code** (1981 Edn.) at p. 594, 'one difficulty involved is that of deciding his standing under s. 323 for he is not 'claiming' title to the land: title is already his'.

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i In the same case, the learned Judge cited the case of *Re An Application by Haupiri Courts*

Ltd. (No. 2) [1969] NZLR 353 where Richmond J. elaborated at p. 357:

He must go further and establish some set of circumstances over and above his status as registered proprietor which affirmatively gives rise to a distinct interest in the land. In such circumstances it would seem that the fact that he is the registered proprietor of an estate or interest under the Act may not prevent him lodging a caveat ... In *Re Grand Trunk Pacific Development Co. Ltd.* [1912] 7 DLR 611, 613, Lamont J. stressed the requirement that caveator must derive the interest which he claims through the transaction (in that case an unregistered agreement) on which the caveat is founded and not from his existing status as registered proprietor. I respectfully agree with that view ... An unduly extensive right to caveat could well lead to an unwarranted interference with the interests of other endeavouring to obtain registration of dealings. Moreover, the registered proprietor, in a case such as the present, is not without his remedy, for he may apply to this Court for an interim injunction against registration.

Edgar Joseph Jr. J. (as he then was) in the latter case has this to say at p. 515:

The opposite opinion was expressed by Richard Talalla JC (as he then was) in *Hiap Yiak Trading Sdn. Bhd. & Ors. v. Hong Soon Seng Sdn. Bhd.*

The opinion of Richard Talalla has come under heavy criticism by Mr. Teo Keang Sood in his well researched article '**Caveating One's Own Land: Cold Comfort for the Registered Proprietor**' [1991] 1 MLJ xxxiv.

With respect, I would express a preference for the opinion expressed by LC Vohrah J. (i.e. in *Eu Finance's* case (*supra*)) for the cogent reasons given by Mr. Teo Keang Sood.

So the ratio is that a registered proprietor of land is not entitled to enter a private caveat in respect of his own land unless he can show some circumstances which affirmatively give rise to a distinct interest in the land other than the fact that he is the registered proprietor of the property. The onus is on the registered proprietor/caveator to satisfy the Court that he has a caveatable interest within the exception. So, the applicant in the present application must discharge the burden in order to entitle her as the registered proprietor to caveat her properties which include the said land.

- a The learned Counsel for the applicant in her submissions concedes that to maintain the applicant's said caveat, she must show that she has a caveatable interest in the said land. This issue, according to the learned Counsel, has been established by the fact that there is a pending action to determine the status of the
- b Trust Deed wherein pursuant to it the respondent is claiming equitable ownership in the applicant's properties. The respondent has in fact lodged a caveat by virtue of that alleged equitable interest. Under such circumstances, says the learned Counsel, pending the determination of the status of the Trust Deed it is not
- c for this Court to determine only on affidavit evidence such a serious issue which goes to the very heart of the indefeasibility of title concept central to the Torrens system. I take by the learned Counsel's submission to mean that as long as there is a serious issue to be tried in an action, the caveatable interest of the registered
- d proprietor of land is established. If that be so, I am afraid that she is greatly mistaken. A serious issue to be tried in an action is only relevant when considering whether a proper and valid caveat ought to be removed pending the disposal of the action relating to the caveat. Having a
- e serious issue to be tried in a pending action does not clothe a person with a caveatable interest over land. In the present proceedings the Court is concerned with the right to caveat own registered properties and not over means of preventing own registered properties from being disposed off pending determination of disputes in the Court of Law. A registered proprietor as
- f such may have other means to do that but if she chooses to do it by means of a private caveat she must establish *locus standi* to caveat her own property. In the instant case I am afraid I cannot find evidence that the applicant has established some set of circumstances over and
- g above her status as registered proprietor which affirmatively gives rise to a distinct interest in the land to entitle her as a registered proprietor to lodge a private caveat over the said land. The pending suit relied upon by the applicant as a basis to allow the said caveat to remain clearly does not support any claim to an interest in the
- h said land distinct from the interest of the applicant in it as a registered proprietor to entitle her to lodge a private caveat under s. 173 of the Code. In the circumstances, the applicant has no caveatable interest over the said land and therefore, the application of the applicant is dismissed with costs to the respondent to be
- i taxed unless agreed.